

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

FERNANDO BECERRA,

Defendant and Appellant.

E072936

(Super.Ct.No. SWF1201058)

OPINION

APPEAL from the Superior Court of Riverside County. John D. Molloy, Judge.

Affirmed.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Daniel Rogers, Adrienne S. Denault, and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Fernando Becerra of first degree murder and found true the special circumstances allegations the murder was gang-motivated and happened during a drive-by shooting. Becerra was not the actual killer. In 2019, he filed a petition for resentencing under the newly enacted Penal Code section 1170.95. The trial court denied the petition because the special circumstances allegations required the jury to find Becerra intended to kill, which means he is not entitled to resentencing under the new law. Becerra appealed.

On appeal, he argues his petition was improperly denied because the errors in the instructions given to the jury could have allowed them to wrongly believe they could find the special circumstances allegations true without finding he intended to kill. As we explain, Becerra is statutorily ineligible for relief because he was convicted of aiding and abetting first degree murder and that crime was not redefined by Senate Bill No. 1437 (2017-2018 Reg. Sess.). We therefore affirm.

## I

### FACTS

On May 31, 2010, Becerra, his brother, and mutual friends got into an altercation with another group of people. After escaping, Becerra and his brother convinced their group to retaliate. A member of the group drove Becerra, his brother, and others back to

the area of the altercation, and Becerra encouraged his brother to fire a shotgun at a group of men as they drove by. These shots killed the victim.<sup>1</sup>

On May 9, 2013, the Riverside County District Attorney charged Becerra with first degree murder. (Pen. Code § 187, subd. (a), unlabeled statutory citations refer to this code.) The information alleged two special circumstances: that the murder was gang motivated (§190.2, subd. (a)(22)) and committed by firing a gun from a car (§ 190.2, subd. (a)(21)). Finally, the information also alleged a gang enhancement (§ 186.22, subd. (b)) and a vicarious firearm enhancement. (§ 12022.53, subds. (d), (e).)

After trial, the jury convicted Becerra of first degree murder and found all the allegations true. The trial court sentenced him to life without the possibility of parole for the murder, plus an additional 25 years to life for the firearm enhancement. Becerra appealed, and in 2015 this court affirmed his judgment. (*People v. Becerra, supra*, E061398 [2015 Cal.App.Unpub.Lexis 7927 at \*21].)

On April 29, 2019, Becerra filed a petition for resentencing under recently enacted section 1170.95, which the People opposed on May 2, 2019. After reviewing our opinion in Becerra's direct appeal, on May 31, 2019, the trial court summarily denied the petition on the ground the jury necessarily found he aided and abetted first degree murder, which renders him statutorily ineligible for relief.

Becerra timely appealed.

---

<sup>1</sup> We summarize and take the facts from our nonpublished 2015 opinion affirming Becerra's conviction. (*People v. Becerra* (Nov. 2, 2015, E061398) [nonpub. opn.] [2015 Cal.App.Unpub.Lexis 7927].)

## II

### ANALYSIS

Becerra argues the trial court improperly denied his petition for resentencing. He argues errors in the jury instructions might have led the jurors to convict him under a natural and probable consequences theory, which would allow him to obtain relief under section 1170.95. We disagree.

In 2018, the Legislature enacted Senate Bill No. 1437, which amended the definition of felony murder in section 189 and eliminated liability for murder under a natural and probable consequences theory. Under the new law, “[a] participant in the perpetration or attempted perpetration of a felony . . . in which a death occurs is liable for murder only if,” they were the actual killer, “[t]he person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree,” or “[t]he person was a major participant in the underlying felony and acted with reckless indifference to human life.” (§ 189, subd. (e)(1)-(3).) Senate Bill No. 1437 also added section 1170.95, which allows “[a] person convicted of felony murder or murder under a natural and probable consequences theory,” to “file a petition with the court that sentenced the petitioner to have the petitioner’s murder conviction vacated and to be resentenced on any remaining counts.” (§ 1170.95, subd. (a); Stats. 2018, ch. 1015, § 4.)

We review a trial court’s order denying an 1170.95 petition under a mixed question of law and fact standard. (See *People v. Drayton* (2020) 47 Cal.App.5th 965, 981.) That is, “[w]here an appeal involves the interpretation of a statute . . . the issue on appeal is a legal one, which we review de novo. [Citation.] Where the trial court applies disputed facts to such a statute, we review the factual findings for substantial evidence and the application of those facts to the statute de novo. [Citation.] “[A]n order is presumed correct; all intendments are indulged in to support it on matters as to which the record is silent, and error must be affirmatively shown.” [Citation.] In addition, we must “view the record in the light most favorable to the trial court’s ruling.” [Citation.]” (*People v. Sledge* (2017) 7 Cal.App.5th 1089, 1095-1096.)

Section 1170.95 establishes the following procedure for processing petitions for relief. Subdivision (a) provides that a person convicted of felony murder or murder under a natural and probable consequences theory may petition the trial court to have his or her murder conviction vacated and be resentenced on any remaining counts if the following conditions are met: (1) A charging document was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine; (2) The petitioner was convicted of first or second degree murder following a trial or an accepted plea; and (3) The petitioner could “not be convicted of first or second degree murder because of changes to Section[s] 188 or 189” made by Senate Bill No. 1437. (§ 1170.95, subd. (a); see *People v. Lewis* (2020) 43 Cal.App.5th 1128, 1136, review granted Mar. 18, 2020, S260598.) Once a complete

petition has been filed: “The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section.” (§ 1170.95, subd. (c).)

Here, the trial court was correct to conclude Becerra did not fall within the provisions of section 1170.95. Our decision in his direct appeal establishes he “was prosecuted solely as an aider and abettor to the murder.” (*People v. Becerra, supra*, E061398 [2015 Cal.App.Unpub.Lexis at \*9].) Though the trial court there erred by instructing the jury Becerra could be found guilty under a natural and probable consequences theory, the error was harmless because the “jury was not misled into basing its finding on the natural and probable consequences doctrine or on a theory of reckless indifference,” and therefore “[t]he record show[ed] the verdict was based on a valid legal ground.” (*Id.* at \*11.) As a result, Becerra’s focus on the potential for ambiguity in the special circumstances instructions is beside the point.

Section 1170.95 offers relief only for those convicted of murder under a felony murder or natural and probable consequences theory. (§ 1170.95, subd. (a).) Becerra was not convicted under either of these theories. Because Becerra aided and abetted murder, he is not eligible for relief under section 1170.95 as a matter of law.

III

DISPOSITION

We affirm the order denying Becerra's petition.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

SLOUGH  
J.

We concur:

MILLER  
Acting P. J.

RAPHAEL  
J.